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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 645

EMELINE MONFILS, ADMINISTRATRIX OF THE ESTATE OF JOSEPH T. MONFILS, JR., DECEASED,

Petitioner,

vs.

W. L. HAZELWOOD AND G. N. DICKENS, TRADING AS H. & D. TRANSFER COMPANY.

BRIEF OF RESPONDENTS.

A. W. GHOLSON, JR.,
T. P. GHOLSON,
BENNETT H. PERRY,
Counsel for Respondents.

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Plaintiff, Petitioner,

vs.

W. L. HAZELWOOD AND G. N. DICKENS, TRADING AS H. & D. TRANSFER COMPANY,
Defendant, Respondents.

BRIEF OF RESPONDENTS.

Statement of Facts.

This is an attempt on the part of an administratrix appointed by the Court of the State of Florida, with no appointment by any Court of North Carolina, to institute an action under Consolidated Statutes of North Carolina, Section 160.

Complaint was filed and summons issued from the Superior Court of Vance County, North Carolina, and served on each defendant. In apt time, the defendants moved that

the cause be transferred to the Superior Court of Halifax County, North Carolina, as a matter of substantial legal right.

Consolidated Statutes of North Carolina, Sections 469, 470;

Railroad v. *Thrower,* 213 N. C. 637.

The defendants in apt time filed demurrer (Consolidated Statutes of North Carolina, Section 509) to the complaint, on the grounds that since it appeared upon the face of the complaint that the purported plaintiff was a foreign administratrix and was not an administratrix appointed by any court of jurisdiction in North Carolina, that the plaintiff was without capacity to sue and had no cause of action against either defendant, and that the complaint did not therefore state a cause of action (R. 6 and 7).

The cause was removed to the Superior Court of Halifax County, North Carolina, as a matter of right. Upon hearing of the demurrer in term in the Halifax County Superior Court, the Presiding Judge sustained the demurrer and dismissed the action (R. 9).

From the ruling of the Presiding Judge the plaintiff appealed to the Supreme Court of North Carolina, and that court sustained the ruling of the lower court, and the decision is reported in 218 N. C. at page 215.

Argument.

I.

The sole question now involved in this action is:

Can a foreign administratrix maintain an action in the courts of the State of North Carolina under the provisions of Consolidated Statutes of North Carolina, Section 160?

This question has been answered in the negative consistently by all applicable decisions, without exception, by the Supreme Court of North Carolina.

Hall v. *R. R.*, 146 N. C. 345;
Hall v. *R. R.*, 149 N. C. 108;
Tieffenbrun v. *Flannery*, 198 N. C. 397.

Section 160 of the Consolidated Statutes of North Carolina (quoted at page 2 of petitioner's Petition for Writ of Certiorari), insofar as it provided a right of action for wrongful death, is worded identically as when construed by the Supreme Court of North Carolina in *Hall* v. *R. R.*, 146 N. C. 345, and is the only statute in North Carolina granting any right of action for wrongful death.

"The right to recover damages for the death of a human being caused by the wrongful act of another did not exist at common law. It is altogether statutory. In this State the right of action is conferred by Consolidated Statutes 160." The action must be begun and prosecuted in accordance with statutory provisions.

Brown v. *R. R.*, 202 N. C. 256 at p. 261.

Unless changed by statutory provision, the common law is declared to be in force in North Carolina.

Consolidated Statutes of North Carolina, Section 970.

"No action was maintainable at common law for death wrongfully caused, and from this it follows that the right to maintain the action is a creature of the Statute."

16 Am. Jur. 46;
Brown v. *R. R.*, *supra*.

The statute (Consolidated Statutes 160) must be strictly construed, and it designates the administrator appointed by

and under the control of the courts of North Carolina as the person to bring the action.

Curlee v. *Power Co.*, 205 N. C. 644;
Causey v. *R. R.*, 166 N. C. 5.

The General Assembly of North Carolina has provided that a non-resident may not be appointed administrator. Consolidated Statutes of North Carolina, Section 8, Subsection 2. Prior to 1868 there was no such statute.

Boynton v. *Heartt*, 158 N. C. 488, at page 492.

However, the action for wrongful death under Consolidated Statutes, Section 160, is sufficient for grant of letters of administration to a resident in the County where the injury and death occurred.

Consolidated Statutes of North Carolina, Section 1, Sub-Section 4;
Vance v. *R. R.*, 138 N. C. 460;
Fann v. *N. C. R. R. Co.*, 155 N. C. 136.

"Where it was provided that the action should be brought by the administrator, it was intended that he should be appointed by the Clerk of the County where the death occurred, if the decedent was a non-resident domiciled in another State and without assets situated here."

Vance v. *R. R., Supra*, at page 463.

"A foreign administrator has no authority in this State, (N. C.), and cannot sue or be sued as such; and since a non-resident cannot be appointed administrator, there should be an ancillary administration by a proper person in this State."

McIntosh, North Carolina Practice & Procedure, p. 234;
Morefield v. *Harris*, 126 N. C. 626;
Hall v. *R. R.*, 146 N. C. 345.

Speaking further upon the subject in *Hall* v. *R. R.*, 146 N. C. 345, at page 351, the Supreme Court of North Carolina said:

> "This suit, though, is brought under OUR statute, and the statement that the statutes of the two states upon the same subject are alike was made in order to show that the distribution of the fund recovered would necessarily be made according to our law. Our statute would control the distribution of the fund, whether the statutes of the two states are alike or not; so it is immaterial to consider the similarity of the two enactments, even if there were evidence. We have held in the last cited case that the funds must not only be distributed according to the law of this State, but by an administrator appointed here, and that is conclusively against the plaintiff's right to recover in this action."

Indeed, to hold otherwise would endanger the right of escheat of the University of North Carolina in appropriate cases.

The complaint filed by the petitioner discloses that the deceased was a resident of Florida, who died in Vance County, North Carolina, on June 17, 1939, as the result of a highway collision on the roads in Vance County. That the petitioner was appointed Administratrix by the Court of the State of Florida. It therefore, appears from the face of the complaint that the petitioner is a non-resident foreign administratrix, and under the statute and under consistent applicable decisions, cannot maintain this action in the Courts of the State of North Carolina.

When it appears from the face of the complaint in the courts of North Carolina that the plaintiff is without capacity to sue, demurrer is proper.

Kochs v. *Jackson*, 156 N. C. 326;

McIntosh, N. C. Procedure & Practice, pages 450-457.

Among the grounds for demurrer in the courts of North Carolina are (a) the plaintiff has not legal capacity to sue, and (b) the plaintiff does not state facts sufficient to constitute a cause of action.

Consolidated Statutes of North Carolina, Section 511.

II.

The petitioner now seeks to invoke the jurisdiction of this Court to revoke the decision and judgment of the Supreme Court of North Carolina by contending that Section 160 of the Consolidated Statutes of North Carolina contravenes Article IV, Section I, and the Fourteenth Amendment, Section I, of the Constitution of the United States. In this view we cannot agree, nor can we agree that the assertion by the petitioner of Constitutional impingement is sufficient to confer jurisdiction. The petitioner suggested in the Supreme Court of North Carolina that these sections of the Constitution were so impinged and the judgment of that court answered it in the negative. (See page 13 of the Record.)

Neither Article IV, Section I, nor the Fourteenth Amendment, Section I, have any relation to this case.

> "It is an elementary principle that letters testamentary or of administration have no legal force or effect beyond the territorial limits of the State in which they are granted. Whatever operation is allowed to administration beyond the original territory of the grant is a mere matter of comity, which every nation is at liberty to yield or withhold, according to its own policy or pleasure, with reference to its own institutions and the interest of its own citizens * * *. If an executor or administrator is permitted to exercise any control over property beyond such jurisdiction, or to make any disposition of it there, the authority to do so must come

from the statutes of foreign jurisdiction, or it must be permitted of mere comity."

21 Am. Jur. 852-853, and cases cited, (Cited with approval in *Meyers* v. *Ferris,* 91 Florida 958).

This Court has repeatedly held that it is the general rule at common law that an administrator cannot sue or be sued in any State or jurisdiction except that in which he was appointed, unless specifically authorized by the Statutes of the foreign jurisdiction, and that ancillary administration in the foreign jurisdiction, in absence of statute, is necessary and proper.

Noonan v. *Bradley,* 9 Wall. (U. S.) 400, 19 L. Ed. 759;

Johnson v. *Powers,* 139 U. S. 156, 35 L. Ed. 112; 11 S. Ct. 525;

Lawrence v. *Nelson,* 143 U. S. 215, 36 L. Ed. 130, 12 S. Ct. 440;

Morgan v. *Potter,* 157 U. S. 195, 39 L. Ed. 670, 15 S. Ct. 670.

At the time the petitioner qualified as administratrix in Florida, on October 17, 1939, the policy of the State of North Carolina had been definitely established by the legislative enactment of Consolidated Statutes 160, as enunciated in *Hall* v. *R. R.* (both cases) *supra,* and in *Tieffenbrun* v. *Flannery, Supra,* and other North Carolina cases hereinbefore cited in this brief, that she, as administratrix could not maintain an action under Consolidated Statutes 160 in the courts of North Carolina, and that the only person having such right would be an ancillary administrator appointed by the Superior Court of Vance County. This policy and the decisions of our court could not be changed by any act of appointment by the courts of Florida.

The right to sue for wrongful death under Consolidated Statutes 160, accrues only to the personal representative appointed by the proper court in North Carolina, and ac-

crues at the date of death. Therefore, the action did not exist prior to the death and the intestate was never vested with such right.

Causey v. *R. R., supra.*

The proper remedy for the petitioner was for ancillary administration in North Carolina of a resident of North Carolina so appointed by the Clerk of Superior Court of Vance County, North Carolina. Under this procedure the estate was vested with all rights, and therefore no rights were denied the estate of the petitioner's intestate.

It is therefore respectfully submitted that the Constitutional provisions referred to and relied upon by the petitioner to give this Court jurisdiction do not in any manner relate to the facts and circumstances of this case.

III.

Neither of the cases of *Helme* v. *Sanders,* 10 N. C. 567; *Hyman* v. *Gaskins,* 27 N. C. 266; nor *Hines, Administrator* v. *Foundation Company,* 196 N. C. 322, cited and relied on by the petitioner, are in point. Neither holds that a foreign administrator can sue in the courts of North Carolina. Indeed, *Hyman* v. *Gaskins* so cited states that ancillary administration is necessary and proper.

IV.

The demurrer of the defendants was properly and aptly filed. It was sustained by the trial court and by the Supreme Court of North Carolina on the grounds:

(1) The plaintiff has no capacity to sue, and
(2) The complaint does not state a cause of action.

We respectfully submit that the ruling and judgment of the Supreme Court of North Carolina is fully in accord

with all applicable decisions of that court, and that Consolidated Statutes 160 is not contrary to the sections of the Federal Constitution referred to by the petitioner, but is a statute granting the right to sue for wrongful death to an administrator appointed by the courts of the State of North Carolina, and is a valid statute. It is further submitted that the judgment and decision of the Supreme Court of North Carolina is correct and should not be interfered with.

It is further respectfully submitted that Petition for Writ of Certiorari should be denied.

W. L. Hazelwood and G. N. Dickens,
Trading as H. & D. Transfer Company,
By Bennett H. Perry,
Of Counsel.
By A. W. Gholson, Jr.,
Of Counsel.
By T. P. Gholson,
Of Counsel.

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